Zainur bin Zakaria v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–09 OF 2000(W)

STEVE SHIM CJ (SABAH & SARAWAK), ABDUL MALEK AHMAD AND HAIDAR FCJJ

27 JUNE 2001

Criminal Procedure *— Contempt of court — Contempt in the face of the court — Advocate and solicitor filing contemptuous motion on behalf of client — Whether acted in bad faith — Charge for contempt must be proved beyond reasonable doubt — Fair and just hearing — Whether court should allow adjournment to allow contemnor to present case fully*

Criminal Procedure *— Contempt of court — Summary power to deal with — Advocate and solicitor filing contemptuous motion on behalf of client — Charge for contempt must be proved beyond reasonable doubt — Fair and just hearing — Whether court should allow adjournment to allow contemnor to present case fully*

The appellant was one of the defence counsel of Dato' Seri Anwar Ibrahim who was charged with the commission of four offences of corrupt practice under the Emergency Ordinance No 22 of 1970. In the course of the trial, the appellant's client applied to disqualify two of his prosecutors based on a statutory declaration made by a senior advocate and solicitor and a letter the senior advocate and solicitor wrote to the Attorney General. The application was supported by an affidavit and both were filed by the appellant's firm. The learned High Court judge held that the application was baseless and proposed to cite the appellant for contempt of court. The learned judge proceeded to a summary process in dealing with the issue and found the appellant guilty of contempt and sentenced him to three months' imprisonment (see [1999] 2 MLJ 577). The appellant appealed to the Court of Appeal against both conviction and sentence and his appeal was dismissed (see [2000] 4 MLJ 134). Hence the appeal came to this court. The issues canvassed by the appellant were: (i) whether the Court of Appeal had erred in law and in fact in holding that the filing of the application by the appellant to disqualify the two prosecutors was reckless, negligent and an act of bad faith which constituted an abuse of the process of court and therefore had the effect of undermining the integrity and/or authority of the trial in progress; (ii) whether the summary procedure in convicting the appellant was correctly adopted and (iii) whether the custodial sentence imposed was appropriate.

Held, allowing the appeal:

(1) (per **Steve Shim CJ (Sabah & Sarawak)**) The appellant was prima facie justified in filing the said application. There could not therefore have been any abuse of the process of court having the effect of undermining the authority and/or integrity of the trial in progress. The charge of contempt of court against the appellant

had not been proved beyond reasonable doubt. The phrase 'an opportunity of answering the charge' must necessarily include that a reasonable opportunity be given to the alleged contemnor to prepare his case. That the conduct of the hearing must be fair is a reflection of the deeper principle that the alleged contemnor is entitled to present his case fully. The learned High Court judge should have allowed the appellant the adjournment he requested so that he could prepare his defence fully, fairly and effectively. By refusing to grant the adjournment, the appellant had been deprived of the opportunity of answering the charge against him (see pp 617E–F, 619I–620A, E–F); *Jaginder Singh & Ors v Attorney General* [1983] 1 MLJ 71 followed.

(2) (per **Abdul Malek Ahmad FCJ**) *Re Bramblevale Ltd* [1970] Ch 128 had decided that in contempt of court cases, proofs must be beyond reasonable doubt. The learned trial judge did not allude to the burden of proof in his judgment. Since the procedure taken was wrong and the matter had certainly not been proved beyond reasonable doubt, the learned trial judge fell into error in deciding that contempt of court had taken place. If the appellant's client had the right to make a complaint and if he had acted properly in making the application, then the appellant's act of filing the application on his client's behalf could not have constituted an interference with the administration of justice and consequently contempt of court. There was really no basis to find the appellant had acted in bad faith in filing the application on behalf of his client (see pp 635G–H, 636G, 637A).

(3) (per **Haidar FCJ**) The issue of trying to derail the trial did not arise as evidence showed that the appellant was merely asking for a short adjournment to prepare his defence, that is, just a few days. Surely justice should be accorded to him to do so as his liberty was at stake and such an application should not be viewed negatively by the court as if to prevent or delay the course of justice (see p 640C–D).

[Bahasa Malaysia summary

Perayu merupakan salah seorang peguam pembela Dato' Seri Anwar Ibrahim yang telah dituduh melakukan empat kesalahan amalan rasuah di bawah Ordinan Darurat No 22 tahun 1970. Sepanjang perbicaraan, anak guam perayu telah memohon menghilangkan kelayakan dua pendakwa raya beliau berdasarkan satu deklarasi statutori yang dibuat oleh seorang peguambela dan peguamcara yang berpengalaman dan sepucuk surat yang ditulis oleh peguambela dan peguamcara tersebut kepada Peguam Negara. Permohonan tersebut telah disokong oleh satu afidavit dan kedua-duanya telah difailkan oleh firma perayu. Hakim Mahkamah Tinggi yang arif memutuskan bahawa permohonan tersebut tidak berasas dan mencadangkan menyaman perayu kerana menghina mahkamah. Hakim yang arif

tersebut telah meneruskan satu proses terus dalam mengendalikan persoalan tersebut dan mendapati perayu bersalah kerana menghina mahkamah dan menjatuhkan hukuman tiga bulan penjara ke atas beliau (lihat [1999] 2 MLJ 577). Perayu telah membuat rayuan kepada Mahkamah Rayuan terhadap kedua-dua sabitan dan hukuman dan rayuan beliau telah ditolak (lihat [2000] 4 MLJ 134). Oleh itu rayuan ini dibuat di mahkamah ini. Persoalan-persoalan yang dibentangkan oleh perayu adalah: (i) sama ada Mahkamah Rayuan telah khilaf di sisi undang-undang dan sememangnya dalam memutuskan bahawa pemfailan permohonan oleh perayu untuk menghilangkan kelayakan dua orang pendakwa raya tersebut adalah melulu, cuai dan satu tindakan yang berniat jahat yang membentuk satu penyalahgunaan proses mahkamah dan oleh itu mempunyai kesan yang menjejaskan integriti dan/atau kuasa perbicaraan yang sedang dijalankan; (ii) sama ada prosedur terus dalam mensabitkan perayu telah digunakan dengan betul; dan (iii) sama ada hukuman tahanan tersebut adalah sesuai.

Diputuskan, membenarkan rayuan tersebut:

(1) (oleh **Steve Shim HB (Sabah & Sarawak)**) Perayu telah diberikan justifikasi prima facie dalam pemfailan permohonan tersebut. Tidak mungkin terdapat oleh demikian apa-apa penyalahgunaan proses mahkamah yang mempunyai kesan yang menjejaskan kuasa dan/atau intregriti perbicaraan yang sedang dijalankan. Pertuduhan menghina mahkamah terhadap perayu tidak dibuktikan melampaui keraguan munasabah. Istilah 'satu peluang menjawab pertuduhan' semestinya termasuk satu peluang yang munasabah diberikan kepada penghina yang didakwa untuk menyediakan kes beliau. Bahawa pengendalian perbiacaraan tersebut mestilah adil adalah satu gambaran prinsip yang lebih mendalam bahawa penghina yang didakwa tersebut berhak untuk mengemukakan kes beliau dengan penuh. Hakim Mahkamah Tinggi yang arif hendaklah membenarkan perayu penangguhan yang beliau pohon agar beliau dapat menyediakan pembelaan beliau dengan sepenuhnya, adil dan berkesan. Keengganan untuk membenarkan penangguhan tersebut, perayu telah terkilan akan peluang untuk menjawab pertuduhan terhadapnya (lihat ms 617E–F, 619I–620A, E–F); *Jaginder Singh & Ors v Attorney General* [1983] 1 MLJ 71 diikut.

(2) (oleh **Abdul Malek Ahmad HMP**) *Re Bramblevale Ltd* [1970] Ch 128 telah memutuskan bahawa di dalam kes-kes penghinaan mahkamah, bukti-bukti mestilah melampaui keraguan munasabah. Hakim perbicaraan yang arif tidak menyentuh tentang beban pembuktian di dalam penghakiman beliau. Memandangkan prosedur yang diambil adalah salah dan perkara tersebut pastinya tidak dibuktikan melampaui keraguan munasabah, hakim perbicaraan yang arif telah terkhilaf dalam memutuskan bahawa penghinaan mahkamah telah berlaku. Jika anak guam perayu

mempunyai hak untuk membuat satu aduan dan jika beliau telah bertindak dengan betul semasa membuat permohonan, maka tindakan perayu memfailkan permohonan bagi pihak anak guam tidak mungkin membentuk satu campur tangan dengan pentadbiran keadilan dan seterusnya penghinaan mahkamah. Tiada apa-apa yang berasas bagi menunjukkan perayu telah bertindak dengan niat jahat semasa memfailkan permohonan bagi pihak anak guam beliau (lihat ms 635G–H, 636G, 637A).

(3) (oleh **Haidar HMP**) Persoalan untuk mencuba memesong perbicaraan tidak timbul kerana keterangan menunjukkan bahawa perayu hanya memohon satu tangguhan pendek untuk menyediakan pembelaan beliau, iaitu, untuk beberapa hari sahaja. Sudah tentu keadilan sepatutnya diberikan kepada beliau untuk berbuat demikian kerana kebebasan beliau dipertaruhkan dan permohonan sebegini tidak sepatutnya dikaji secara negatif oleh mahkamah seperti ingin menghalang atau melewat-lewatkan pelaksanaan keadilan (lihat ms 640C–D).]

Notes

For cases on contempt of court generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1120–1144.

Cases referred to

Appuhamy v R [1963] AC 474 (refd)
Attorney General v Butterworth & Ors [1963] 1 QB 696 (refd)
Attorney General v Times Newspaper Ltd [1973] 3 All ER 5 (refd)
Attorney General v Times Newspapers Ltd & Anor [1992] 1 AC 191 (refd)
Attorney General, Malaysia v Manjeet Singh Dhillon [1991] 1 MLJ 167 (refd)
Balogh v Crown Crown at St Albans [1974] 3 All ER 283 (refd)
Bramblevale Ltd, Re [1970] Ch 12 (refd)
Chang Hang Kiu v Piggot [1909] AC 312 (refd)
Cheah Cheng Hoc v PP [1986] 1 MLJ 299 (refd)
Jaginder Singh & Ors v Attorney General [1983] 1 MLJ 71 (folld)
Kumaraendran, Re; An Advocate & Solicitor [1975] 2 MLJ 45 (refd)
PP v Lee Ah Keh & Ors [1968] 1 MLJ 22 (refd)
R v Griffin (1988) 88 Cr App R 63 (refd)
Yee Chang & Co Ltd v NV Koninklijke Paketvaart Maatschappij [1958] MLJ 131 (refd)
Zainur Zakaria, Re [1999] 2 MLJ 577 (refd)
Zainur bin Zakaria v PP [2000] 4 MLJ 134 (refd)

Legislation referred to

Emergency (Essential Powers) Ordinance No 22 of 1970
Emergency Ordinance No 22 of 1970 s 2
Legal Profession (Practice and Etiquette) Rules 1978 rr 9, 16

Appeal from: Criminal Appeal No W05–83 of 1998 (Court of Appeal, Kuala Lumpur)

Raja Aziz Addruse (*Sulaiman Abdullah, Ambiga Sreenevasan, Christopher Leong, Ramid Khan* and *Gopal Sreenevasan* with him) (*Sivananthan*) for the appellant.

Mohd Yusoff Hj Zainal Abidin (*K Muniandy* and *Noorbahari Baharuddin* with him) (Attorney General's Chambers) for the respondent.

Steve Shim CJ (Sabah & Sarawak):. This appeal turns on a most significant legal aspect in the administration of justice, namely contempt of court. Contempt of court is an ancient concept developed over the centuries in England as a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally. For a better prespective of this concept, I can do no better than refer to the illuminating speeches made by a strong panel of Law Lords in *Attorney General v Times Newspaper Ltd* [1973] 3 All ER 54 (universally known as 'the thalidomide case'). Therein, Lord Morris has said as follows:

> …, the phrase 'contempt of court' is one which is compendious to include not only disobedience to orders of a court but also certain types of behaviour or varieties of publications in reference to proceedings before courts of law which overstep the bounds which liberty permits. In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognized courts of the land are so flouted that their authority wanes and is supplanted. But as the purpose and existence of courts of law is to preserve freedom within the law for all well disposed members of the community, it is manifest that the courts must never impose any limitations on free speech or free discussion or free criticism beyond those which are absolutely necessary. When therefore a court has to consider the propriety of some conduct or speech or writing decision will often depend on whether one aspect of the public interest definitely outweighs another aspect of the public interest. Certain aspects of the public interest will be relevant in deciding or assessing whether there has been contempt of court. But this does not mean that if some conduct ought to be stigmatized as being contempt of court it could receive absolution and be regarded as legitimate because it had been inspired by a desire to bring about a relief of some distress that was a matter of public sympathy and concern. There can be no such thing as a justifiable contempt of court.

These are words of unparallelled wisdom which should be engraved in tablets of stone. Lord Diplock, sitting in the same case, echoed words in identical vein when he states with inimitable clarity (at p 71):

> …, in any civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a

> system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another. 'Contempt of court' is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes. Contempt of court may thus take many forms.

And later he says (at p 72):

> The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.

Now, this peculiar English concept is applicable in Malaysian law by virtue of s 3 of the Civil Law Act 1956, but it has to be moulded to take into consideration local conditions and peculiarities (see *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167). It is of course well settled that at common law, a judge of the superior courts has jurisdiction to punish summarily, of his own motion, for contempt of court whenever there has been a gross interference with the course of justice in a case that is being tried or is about to be tried, whether the judge has seen the contempt with his own eyes or it has been reported to him; the jurisdiction is not limited to contempt committed 'in the face of the court'. This expression 'in the face of the court' has never been defined and is not confined to conduct which a judge sees in his presence. It covers all contempts for which a judge of his own motion could punish a man on the spot. Lord Denning MR in *Balogh v Crown Court at St Albans* [1974] 3 All ER 283, had described 'contempt in the face of the court' as the same thing as 'contempt which the court can punish of its own motion'. Such contempt would be visited with summary punishment. In this respect, the noble Lord took pains to underline the need for caution when he said as follows (at p 288):

> This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the judge and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately — so as to maintain the authority of the court — to prevent disorder — to enable witnesses to be free from fear — and jurors, from being improperly influenced — and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt: see *R v Gray* [1900] 2 QB at p 41, [1900–3] All ER at p 62 by Lord Russell of Killowen CJ. But properly exercised, it is a power of the utmost value and importance which should not be curtailed.

Nearer home, the same caution was also emphasized by Raja Azlan Shah (Ag LP as he then was) in *Jaginder Singh & Ors v Attorney General* [1983] 1 MLJ 71, when he said at p 73:

> We have said many a time that the summary contempt procedure not only should be employed most sparingly but should rarely be resorted to except in those exceptional cases where it is urgent and imperative to act immediately to preserve the integrity of the trial in progress or about to commence.

The issues

It is in the light of the above stated principles and observations that this appeal will be considered, but first, let me, in passing, touch on a matter which is not entirely clear, and that is: why the learned High Court judge had thought it fit to proceed only against the appellant when there was sufficient evidence to indicate that the affidavit in support of the disqualification application affirmed by Dato' Seri Anwar Ibrahim ('DSAI') was prepared and settled by leading counsel Raja Aziz Addruce and Haji Sulaiman Abdullah and the appellant was apparently only concerned in filing it on behalf of DSAI. Indeed, Haji Sulaiman Abdullah, in his submission, had, rather ungraciously I thought, referred to the appellant's role as no more than that of a filing clerk. Perhaps the learned judge had singled him out in order to put a message across to the defence team that he wanted no nonsense in his court. Whatever the case, it does raise a perplexing question. I will say no more beyond that.

In this case, although the appellant canvassed 12 grounds in his petition of appeal, they can be effectively compressed into three:

(1) whether the Court of Appeal (see *Zainur bin Zakaria v PP* [2000] 4 MLJ 134) had erred in law and in fact in holding (as the High Court had done) that the filing of the application by the appellant to disqualify the two senior prosecutors was reckless, negligent and an act of bad faith which constituted an abuse of the process of court, and therefore had the effect of undermining the integrity and/or authority of the trial in progress;

(2) whether the Court of Appeal erred in law and in fact in holding that the learned High Court judge had correctly adopted the summary procedure in convicting the appellant for contempt of court;

(3) Whether the custodial sentence imposed on the appellant was appropriate in the circumstances of this case.

The factual background

The background facts have been admirably set out in the judgment (see *Re Zainur Zakaria* [1999] 2 MLJ 577). As such, I find it unnecessary to restate them here except very briefly in order to keep track of the proper perspectives. The appellant was one of the defence counsel of DSAI who was charged with the commission of four offences of corrupt practice under s 2 of the Emergency Ordinance No 22 of 1970. In the course of the trial, on 30 November 1998, DSAI applied to disqualify two of his prosecutors,

ie Dato' Abdul Gani Patail ('AGP') and En Azahar bin Mohamed apparently based on a statutory declaration dated 9 November 1998 made by En Manjeet Singh Dhillon ('MSD'), a senior advocate and solicitor and a letter, dated 12 October 1998 he wrote to the Attorney General. The main ground relied on was that the prosecutors were actively involved in requesting one Datuk Nallakaruppan ('Nalla') to fabricate evidence against DSAI. The application was supported by the affidavit affirmed by DSAI. Both the application and the affidavit in support were filed by the appellant's firm. The learned High Court judge held that the application was baseless and proposed to cite the appellant for contempt of court. He thereafter embarked upon a summary process in dealing with the issue at the end of which he found the appellant guilty of contempt and sentenced him to three months' imprisonment (*Re Zainur Zakaria* [1999] 2 MLJ 577). The appellant appealed to the Court of Appeal against both conviction and sentence. That appeal was dismissed (*Zainur bin Zakaria v PP* [2000] 4 MLJ 134). He now appeals to this court against that decision.

Whether filing of application reckless, negligent and in bad faith

This first issue, as I have stated, relates to the question of whether the appellant, in filing the disqualification application, had acted recklessly, negligently and in bad faith. The issue is reflected in that part of the judgment of the learned High Court judge which reads:

> The pertinent parts of exh ID14B that I have reproduced reveal the involvement of Datuk Nallakaruppan in the alleged relationship between the accused and Shamsidar. As this exhibit was in the possession of the prosecution when MSD met AGP, AGP was clearly not asking for '… evidence that is otherwise not there …'. As ZZ was aware, or ought to have been aware, of the contents of exh ID14B, his acceptance of the conclusion of MSD as appearing in para 4 of the letter is sheer recklessness and negligence at its height. ZZ has in fact expanded on the mildly worded conclusion of MSD to found an allegation which is completely baseless and unsupported by the evidence available to him. As a matter of fact, the contents of exh ID14B ought to have put ZZ on guard when he read the letter. I would have expected him, as a senior member of the Bar and an officer of the court, to have alerted MSD on the folly of the conclusion drawn by the latter in the light of information available to him. That may have afforded an opportunity for MSD to retract from the stand that he had taken.

It is to be noted that the initials ZZ above refer to the appellant. This part of the judgment was also fully cited by the Court of Appeal in its acceptance of the findings of the High Court at p 143 of *Zainur bin Zakaria v PP*. In order to appreciate fully the stand taken by the High Court as reflected above, it is necessary to look closely at the letter exh ID14B referred to as well as the letter dated 12 October 1998 written by MSD to the Attorney General. Because of the central role played by these documents, I think it is appropriate to reproduce them *in extenso*. First, exh ID14B reads as follows:

> BAB MODUS OPERANDI ANWAR - SHAMSIDAR - DATUK NALLA
> Pada kebiasaannya, si pemandu Azizan akan menurunkan Shamsidar pada setiap kali pertemuan di Cafe Guana di Bangsar Shopping Complex dan

kereta mewah Daimler WBV 37 yang dikatakan kepunyaan Datuk Nalla (Eksekutif Director Magnum Corp) akan datang bersama beliau untuk menjemputnya di Bangsar Shopping Complex dan seterusnya mereka akan menuju ke kondominium mewah di Tivoli Villa untuk tempoh dua-tiga jam. Waktunya ialah 5.30 petang dan pada kebiasaannya ialah pada hari Rabu.

Alasan yang sering diberikan oleh Anwar kepada polis pengiring bahawa beliau ingin bermain tennis dengan Nalla di Bukit Kiara. Polis pengiring dilarang turut serta. Begitulah kejadian keji yang berlaku sekian lama untuk tempoh beberapa tahun tanpa pengetahuan Azmin.

Selalunya, perbuatan mereka adalah dua minggu atau sebulan sekali.

BAB KEJADIAN 30 JUN 1997 5.35 PETANG (ISNIN)

Saya menerima panggilan telefon pada pukul 5 petang dari Azizan bahawa satu pertemuan antara mereka, yakni Anwar - Shamsidar di Bangsar Shopping Complex.

Ketika itu, saya berada di Setapak dan dengan penuh rasa tanggungjawab bagi memastikan pengaduan Azizan adalah benar dan sahih, maka saya berkejar ke tempat kejadian iaitu di Bangsar Shopping Complex.

Dalam perjalanan, saya sempat menelefon abang sulung, Mohd Azman Ali untuk turut serta.

Bersama saya ialah rakan karib saya Pn Zamrah Lajis. Saya juga sempat menelefon seorang lagi rakan bernama Pn Normala untuk meminjam pelekat kereta Kondominium Tivoli Villa bagi tujuan masuk ke dalam kondominium.

Dengan izin Allah, kami tiba tepat pada masanya di mana kereta Daimler WBV 37 sedang menanti. Mereka tidak perasan kehadiran kami.

Akhirnya, Allah telah menunjukkan di depan mata kami Pn Shamsidar menaiki kereta tersebut menyusur ke Kondo Tivoli Villa Bangsar.

Kami mengekorinya dari belakang tanpa pengetahuan mereka.

Lima saksi pada kejadian tersebut ialah Ummi Hafilda Ali, Mohd Azman Ali, Pn Zamrah Lajis, Pn Normala dan Azizan Abu Bakar.

Mereka keluar dari Kondo Tivoli Villa pada pukul 7.40 malam dan kereta Daimler menghantar semula Shamsidar ke Bangsar Shopping Complex di mana Azizan menanti di tempat yang sama

Kami tidak keberatan memberikan laporan terperinci sekiranya diberikan peluang untuk bertemu secara peribadi dengan YAB yang cukup kami sanjungi.

Saya hampir-hampir gila bila mengenangkan seorang tokoh pemimpin yang begitu saya sanjungi lebih-lebih lagi ketokohan beliau di bidang agama sanggup melakukan perbuatan yang amat keji dan hina sebagai pemimpin negara.

Mujurlah, abang saya Mohd Azman menenangkan keadaan di mana beliau mengatakan terlalu bahaya untuk kami mengambil tindakan apatah lagi ketika itu bapa kepimpinan yang amat kami sanjungi iaitu Dato' Seri Dr Mahathir tiada di dalam negara.

Seluruh keluarga terperanjat, sedih, tertekan, terhina oleh perbuatan keji insan munafik Anwar Ibrahim. Tetapi apakan daya, kami tiada kuasa kecuali meminta pandangan dari rakan-rakan yang saya percaya seperti Pn Sri Saadah dan Pn Norziela Jalil yang akhirnya memberikan saya semangat bagi membongkar pembohongan dan kemungkaran terbesar di mukabumi ini.

YAB, kami tidak melaporkan kepada Mohamed Azmin kerana percaya bahawa kasih-sayang dan kesetiaannya terhadap isteri dan ketua tidak berbelah bagi. Kami juga khuatir beliau mungkin mengambil tindakan di luar jangkaan sekiranya berasa amat tertekan.

Next, the letter by MSD states:

Re: PP lwn Nallakaruppan a/l Solaimalai
KL High Court Criminal Trial No 45–40–98

At the very outset, let me apologize for writing this letter in English. I would, under normal circumstance have arranged for my staff to translate it into Bahasa but there are matters that I am about to set out that for the moment I feel are best left on a p & c basis. Hence the need to keep the letter away from my staff. I have even taken the precaution of hand delivering this letter myself.

You will recollect that I wrote to you on 1 October 1998 on the above matter citing the recent prosecution of Samsuri Welch Abdullah under the Arms Act 1960 as a comparative basis for you to amend the charge against Nallakaruppan from the Internal Security Act 1960 to one under the Arms Act 1960, I had copied that letter to Dato' Abdul Gani Patail. I had expected a response from your office but instead, as in the case of my first letter dated 17 August 1998, I had a call from Dato' Abdul Gani Patail on 2 October 1998 asking to see me on a very urgent basis. Both Mr Balwant Singh Sidhu and I saw him at 3.20 pm on 2 October 1998. The date & time of this visit is recorded in the police log book maintained outside Dato' Abdul Gani's office on the 17th floor of Bangunan Bank Rakyat.

I had gone to this meeting with the expectation that, on the basis of my 1 October letter, there would be some discussion about possible sections under the Arms Act 1960 with a view to an amendment of Nallakaruppan's present ISA charge. To my absolute horror and disappointment Dato' Abdul Gani Patail used the meeting and the death sentence under s 57 of the ISA as a bargaining tool to gather evidence against Dato' Seri Anwar Ibrahim. He had with him the letter I had written to you and copied to him. He was waving the letter about and kept on saying, repeatedly, 'I am not impressed' and suggesting that he would not be impressed with my plea to a charge under the Arms Act but instead wanted more. This 'more', and it came across very loud and clear because Dato' Abdul Gani Patail laid it out in very clear and definite terms, was:

1 That Nallakaruppan was now facing the death sentence.

2 That there were other charges also under the ISA that he could prefer against Nallakaruppan but that if they (A-G's chambers?) hanged him once under the present charge what need would there be to charge him for anything else.

3 That in exchange for a reduction of the present charge to one under the Arms Act, he wanted Nallakaruppan to cooperate with them and to give information against Anwar Ibrahim, specifically on matters concerning several married women. Dato' Abdul Gani kept changing the number of women and finally settled on five, three married and two unmarried.

4 That he would expect Nallakaruppan to testify against Anwar in respect of these women.

I was shocked that Dato' Abdul Gani even had the gall to make such a suggestion to me. He obviously does not know me. I do not approve of such extraction of evidence against ANYONE, not even or should I say least of all,

a beggar picked up off the streets. A man's life, or for the matter, even his freedom, is not a tool for prosecution agencies to use as a bargaining chip. No jurisprudential system will condone such an act. It is blackmail and extortion of the highest culpability and my greatest disappointment is that a once independent agency that I worked with some 25 years ago and of which I have such satisfying memories has descended to such levels in the creation and collection of evidence. To use the death threat as a means to the extortion of evidence that is otherwise not there (why else make such a demand?) is unforgivable and surely must in itself be a crime, leave alone a sin, of the greatest magnitude. Whether his means justify the end that he seeks are matters that Dato' Abdul Gani will have to wrestle with within his own conscience.

I have agonized over this machinations of Dato' Abdul Gani's for the last ten days. I have known you for close to 26 years. I cannot imagine you condoning such an act. And so this third and final letter on this matter and my decision to let you know what transpired on the afternoon of 2 October 1998. How far into your chambers the corruption has spread I cannot say but that you will have to stop it goes without saying.

Nallakaruppan does not deserve the charge under the ISA bearing in mind what I have set out above and what is tabulated below. The facts relating to the 125 bullets have been set out in my earlier two letters. In my second letter, I mentioned the Samsuri Welch Abdullah charges. I have since researched into the Arms Act prosecutions by your department over the last ten years but because of the constraint of time have only been able to go back till 1993, a period well within your tenure as Attorney General. I have chronologically listed out below all the cases reported in the local papers that I have been able to locate. All that is important at this juncture is to note that even in matters of far greater magnitude, you have chosen the Arms Act as the vehicle for your prosecutions.

It seems clear that the learned judge in the High Court had taken the stand that as the appellant was aware of exh ID14B, his acceptance of the conclusion by MSD in para 4 of the letter which MSD wrote to the Attorney General, was (as he put it) 'sheer recklessness and negligence at its height.' In para 4 of his letter, MSD had, in effect, concluded that AGP had used the meeting on 2 October 1998 as 'a means of invoking the death threat to extract and/or extort evidence from Nalla against DSAI. Quite obviously, the learned High Court judge did not think that such a conclusion was justifiable under the circumstances. So did the Court of Appeal.

It is, I think, important to note that the pertinent parts of exh ID14B relied on by the learned High Court judge, and which he himself conceded, concerned the involvement of Nalla in the alleged relationship between DSAI and Shamsidar, the wife of his secretary. The allegation shows, clearly enough, DSAI's extramarital affairs with one married woman. But at the meeting on 2 October 1998, AGP had wanted Nalla to give evidence specifically of DSAI's alleged sexual involvement with five women: three married and two unmarried. This, of course, begs the question: why specifically with five women? In my view, only AGP could have provided the answer, but unfortunately, he did not file any affidavit in response nor was he called as a witness to explain. Given the stand taken by DSAI throughout the trial in denying and/or disputing any extramarital affairs with other

women, it could hardly provoke any surprise that he should allege that the request made by AGP at the meeting on 2 October 1998 was an attempt to get Nalla to fabricate evidence against him. At this stage, we would not, of course, be concerned with whether or not the denial and/or dispute had any merit because no charges had yet been brought against DSAI relating to his alleged extramarital affairs. What was perfectly clear then was the stand he took in the trial when he denied and/or disputed the prosecution's allegation of extramarital affairs. In the circumstances, was he not justified, on a prima facie basis, in complaining that AGP's conduct at the meeting on 2 October 1998 was an attempt to get Nalla to fabricate evidence in order to prefer charges against him for other alleged sexual offences? Looking squarely at the picture from his standpoint and given the fact that at the material time, he had not as yet been charged with any sexual involvement with other women, I would think that his complaint was prima facie justified.

But what about the standpoint of AGP? Was it legally proper for him to request for assistance from Nalla in the manner he did? In this respect, the learned High Court judge had, quite rightly, stated that it was within the power of the Public Prosecutor not to charge a person or to prefer a reduced charge against him if he cooperated with the police by providing information to secure the conviction of his partners in crime. He cited in support a passage from *The Law of Evidence by Woodroffe & Amir Ali* (16th Ed) at p 3464 which reads:

> The police, of course, will never solicit a party to become an approver unless they have failed in every other mode. When, however, they consider it necessary to resort to this measure and have obtained the necessary authority, they will, of course, be at liberty to address themselves directly to such of the prisoners as they think most proper, and to urge them, by every argument and by the fullest promises of pardon, to make a free disclosure. A good deal of fact, however, will be necessary in selecting the prisoners whom it is desired to admit as approvers; it will not do to embarrass the course of justice by pardoning more criminals than can be helped. On the other hand, it is necessary to choose one who is thoroughly acquainted with every circumstance and every accomplice, and who is at the same time willing to tell the entire truth. … It should then be definitely explained to him that his pardon is only conditional, and that the condition is, that he should make a full and true disclosure of everything he knows, and of every person connected with the matter.

It seems evident from the passage above that the discretionary power of the Public Prosecutor is invoked only as a last resort. Two prerequisites appear to exist, namely: (1) that the Public Prosecutor considers it necessary to resort to such an exercise: and (2) that the exercise should be conducted properly and fairly so as to obtain a full and free disclosure by the accomplice. Given those prerequisites, what is the position in the instant case? Here, there was no explanation as to why AGP had thought it fit to seek the cooperation of Nalla. He had not filed any affidavit in reply nor was he called as a witness. Had he been called, he could well have explained the situation and perhaps to the satisfaction of the court. The learned High Court judge held that Nalla was an accomplice drawing particular attention to exh ID14B, a document in the possession of the prosecution, the contents have been set out *in extenso*,

but as I have stated, a close scrutiny of the contents therein, would disclose that he (Nalla) was only involved in the alleged relationship between DSAI and Shamsidar (the wife of his secretary) and no one else. I have also indicated that AGP had, at the meeting on 2 October 1998, sought his assistance in respect of not just one woman but specifically with five women. AGP might well have his reasons for placing a specific figure on the number of women involved but, in my view, he should have been called to extrapolate. As this was not done, we are left with the unenviable position of questioning the motive or motives of AGP.

It is common ground that the application filed by the appellant on behalf of DSAI was grounded on two documents, more particularly on the letter dated 12 October 1998 which MSD wrote to the Attorney General informing him of the events which transpired at a meeting he had with AGP on 2 October 1998 and his reaction or perception on the matter. He was obviously taken aback by what AGP had said at the meeting and he had perceived the conduct of AGP to be an attempt to extract and/or extort evidence. It is, I think, an error of judgment, to conclude purely on the basis of the letter dated 12 October 1998 that MSD's reaction or perception was ill founded without taking into consideration all the circumstances in which the meeting was held. As the letter merely summarized the terms attributable to AGP, evidence would have to be led as to the exact words used and how they were uttered, etc. Reading the letter as a whole, it is not unreasonable to assume that the atmosphere at the meeting could not have been anything but tense. Voices could well have been raised. One gets the distinct impression that AGP was extremely annoyed as he began to set down his terms in pretty strong language. It would appear that at one stage of the meeting, he was waving a copy of the letter and said repeatedly that he was not impressed. He then indicated to MSD in no uncertain terms that he wanted Nalla to cooperate and give information against DSAI specifically on matters concerning five women and added that he would expect Nalla to testify against DSAI in respect of these women. It would appear that what was perhaps originally intended to be a mere request by AGP had suddenly been transformed into a demand of sorts. That process of metamorphosis was clearly evident here.

Given this scenario, it was hardly surprising that MSD should have concluded or perceived that there was an attempt to extract or extort evidence from Nalla on the part of AGP. If there was, wherefore can it be said that there had been a full and free disclosure by Nalla? It would have been a clear contravention of the second prerequisite I spoke of a moment ago that the prosecution has to act properly and fairly in seeking the cooperation and assistance of an accomplice. Furthermore, there is nothing to indicate or suggest that AGP had made any effort to determine whether or not Nalla was in a position to give such evidence. If he (Nalla) was unable to give the sort of information requested to the knowledge of AGP, then quite clearly, this would be asking Nalla to give evidence which never existed — in short, to fabricate evidence. In my view, evidence should have been led to ascertain these matters by calling MSD and/or AGP. They should have been given the opportunity to explain.

In the circumstances, the view taken by the learned High Court judge that the request for information by AGP in this case was an exercise of lawful powers with no undertones of any impropriety is clearly misconceived. It follows therefore that the Court of Appeal's endorsement of that view is equally tainted with the same misconception.

I have earlier drawn attention to that part of the judgment of the learned High Court judge when he said that since the appellant was aware of the contents of exh IDI4B in the possession of the prosecution at the material time, he should have been on his guard when he read the letter dated 12 October 1998 written by MSD to the Attorney General and which should have prompted him, as a senior member of the Bar and an officer of the court, to alert MSD as to the folly of his conclusions. With respect, such a stand could not have been tenable as it would conceivably be premised on the wrong assumption that the appellant had accepted or should have accepted the truth of the contents in exh ID14B. It is clear that the accused DSAI had, in the course of his trial, denied and/or disputed the allegation that he had had extramarital affairs with other women. As I said before, whether that denial and/or dispute had any merit or not was beside the point. What was significant was the fact that DSAI had taken such a stand. The learned High Court judge had apparently failed to consider this material particular and, as a result, had arrived at a conclusion which, in my view, was quite unsustainable in all the circumstances.

For the reasons stated, I must, with respect, disagree with the High Court in holding (as did the Court of Appeal) that the appellant had acted recklessly, negligently and in bad faith in filing the disqualification application. In my view, he was prima facie justified in filing the said application. In the premises, there could not therefore have been any abuse of the process of the court having the effect of undermining the authority and/or integrity of the trial in progress. It must consequently follow, as night follows day, that the charge of contempt against the appellant has not been proved beyond reasonable doubt.

Whether correct summary procedure adopted

I have, at the outset of this judgment, cited with approval those observations of Lord Donning MR in *Balogh v Crown Court*, which will, I believe, echo in the corridors of the judiciary for all time. He said that the power of summary punishment was a great power but a necessary one given to maintain the dignity and authority of the judge and to ensure a fair trial. He emphasized that it should only be exercised when it was urgent and imperative to act immediately with scrupulous care and when the case was clear and beyond reasonable doubt. The summary procedure in proceedings for criminal contempt has been succinctly laid down by Mustill LJ in *R v Griffin* (1988) 88 Cr App R 63 when he said, inter alia:

> We are here concerned with the exercise of a jurisdiction which is sui generis so far as the English Law is concerned. In proceedings for criminal contempt, there is no prosecutor, or even a requirement that a representative of the Crown or of the injured party should institute the proceedings. The judge is

> entitled to proceed of his own motion. There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary inquiry or filtering procedure such as a committal. Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquires into the circumstances so far as they are not within his personal knowledge. He identifies the grounds of complaint, selects the witnesses and investigates what they have to say (subject to a right of cross-examination), decides on guilt and pronounces sentence. This summary procedure, which by its nature is to be used quickly if it is to be used at all, omits many of the safeguards to which an accused is ordinarily entitled, and for this reason it has been repeatedly stated that the judge should choose to adopt it only in cases of real need.

Bearing those observations in mind, what is the position in the case at bar? Here, the procedure employed by the learned judge of the High Court has been stated in the forefront of his judgment. Therein, he dealt with the disqualification application very shortly after it was filed by the appellant. From the notes of evidence, it would appear that the learned judge began by calling upon the appellant to read the statutory declaration affirmed by MSD as well as the letter dated 12 October 1998 he wrote to the Attorney General. Having read them, the learned judge drew the appellant's attention to paras 13, 16 and 18 of the affidavit deposed by DSAI which he apparently took umbrage and thereafter posed certain questions to the appellant, at the end of which he came to this conclusion delivered *extempore*:

> This application, with its affidavit in support, is an interference with the course of justice as it has no basis. (I explain.) It therefore amounts to a pre-emptive step to undermine the integrity of a trial in progress. The object is to project an impression that the prosecution is anchored on fabricated evidence. This is a serious contempt and I have to act on it with all urgency to preserve the integrity of this trial. As I said in the early stage of this trial I will not hesitate to flex every inch of my judicial muscle to ensure that this trial proceeds smoothly. It is my duty to guarantee that persons who are following this trial are not hoodwinked in any way. With an application of this nature to muddy the smooth flow of justice, I would not be surprised if a similar application is made to have me disqualified from hearing this case. In the light of the baseless application filed by you which is totally unsupported by the documents exhibited by you, I propose to cite you for contempt for having attempted to undermine the integrity of this trial. Before I do so, this court will show mercy towards you by dropping all further proceedings if you tender an unconditional apology to this court, to the A-G, to Dato' Abdul Gani Patail and to En Azahar for filing an application which is absolutely baseless and which is an abuse of the process of court.

He then cited the appellant for contempt of court after the latter refused to tender his apologies to the court and the prosecution. In citing the appellant for contempt, he called upon him to show cause why he should not be punished for contempt for filing a notice of motion with a supporting affidavit containing scandalous and contemptuous matters, in particular paras 13, 16 and 18 thereof. Raja Aziz Addruce, leading counsel for the defence thereupon intimated to the court that in view of the unusual turn of events, they would need time to prepare the appellant's defence. He then

asked for a short adjournment. This was disallowed. The learned judge directed the appellant to show cause immediately. The appellant mounted the witness box and gave evidence briefly. This was followed by submissions from Raja Aziz Addruce and the Attorney General. The appellant was then found guilty and he was asked to address the court on sentence which he did. When he again refused the tender the apologies requested by the court, he was sentenced to three months imprisonment.

In this appeal, the appellant is not complaining so much about whether the learned High Court judge was legally entitled to invoke the summary procedure in dealing with the alleged contempt, but that the procedure employed by him did not ensure sufficient fairness to the appellant when he was refused time to prepare his defence and call witnesses. At this point, I should perhaps draw attention to the relevant principle expressed so forcefully by Abdoolcader J (as he then was) in *Re Kumaraendran, An Advocate & Solicitor* [1975] 2 MLJ 45 when he said at p 47:

> The power to take cognisance of any contempt of court connotes summary disposal of the matter as an offence without the formality of a charge or complaint. Punishment for contempt in the face of the court which may be imprisonment or a fine can be imposed immediately and without notice (*Watt v Ligertwood* (1874) LR 2 HL Sc 361), but it has however been firmly established that:
>
> > 'No person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him: *Re Pollard* (1869) LR 2 PC 106 at p 120.'

The Privy Council followed this decision in the later case of *Chang Hang Kiu v Piggot* [1909] AC 312, and affirmed it again in *Appuhamy v R* [1963] AC 474. All J, (as he then was) applied this very principle in *PP v Lee Ah Keh & Ors* [1968] 1 MLJ 22. It is therefore abundantly clear that in such cases it is necessary that the contempt should be distinctly stated and that the alleged contemnor should be given an opportunity of answering the charge.

In the more recent case of *Jaginder Singh & Ors v Attorney-General*, the observation of Raja Azlan Shah Ag LP (as he then was) indicated how important it was to comply with this principle in dealing with a charge of contempt of court. He said as follows at p 74:

> The disturbing aspect, amongst others, in this case is that no specific charges against the appellants were distinctly stated and what is worse they were not given an opportunity to answer and defend themselves. It is unthinkable that they should be sent to prison unless specific charges were framed and they have had an opportunity to answer them. This is because the summary contempt procedure more often involves a denial of many of the principles of natural justice, requiring, as it did in this case, that the judge should not only be both prosecutor and adjudicator, but should also have been witness to the matters to be adjudicated upon.

In my view, the phrase 'an opportunity of answering the charge' must necessarily include that a reasonable opportunity be given to the alleged contemnor to prepare his case. That the conduct of the hearing must be fair

is a reflection of the deeper principle that the alleged contemnor is entitled to present his case fully.

As I said, the main complaint in this case is that the appellant was not given an opportunity to answer and defend himself. He had wanted an adjournment in order to prepare his defence to the charge of contempt and to call witnesses. The learned High Court judge had refused his request made through his counsel, Raja Aziz Addruse. Apparently, the main reason for the refusal was because the learned judge took the stand that it was unnecessary to call witnesses as it was sufficient for him to rely on the documents filed by the appellant which he considered comprehensive for the purpose. It might be argued that this was a matter strictly within the discretion of the learned High Court judge. That, of course, could not be disputed. But that discretion had to be exercised judicially. It was not done here. For the reasons already stated, I take the view that the exercise of that judicial discretion must necessarily entail the calling of certain witnesses such as AGP and MSD. To merely rely on the documents, without more, would be an act of injudicious discretion.

Having regard to the very serious nature of the charge against the appellant, he should have been given the opportunity of calling witnesses to rebut the allegation that the affidavit in support of the disqualification application contained scandalous and contemptuous matters. Here, I would echo the sentiment expressed by Raja Azlan Shah Ag LP in *Jaginder Singh* that it is unthinkable for a person to be sent to prison unless he has been given the opportunity of answering the charge against him. In my view, the learned High Court judge should have allowed the appellant the adjournment he requested so that he could prepare his defence fully, fairly and effectively. It may well be that such an exercise was likely to delay further the trial of DSAI, but this consideration must be balanced against the obvious need for the court to comply with that immortalized maxim which has so often been repeated, like incantations in a religious order, that justice must not only be done but must manifestly be seen to be done. By refusing to grant the adjournment, the appellant had, in effect, been deprived of the opportunity of answering the charge against him, thereby offending the sacrosanctity of a principle so fundamental to our system of justice. In the circumstances, I must, with respect, disagree with the stand taken by the Court of Appeal that the High Court had complied with the said principle on this score. In that context, I hold that the summary procedure invoked by the learned High Court judge had not been correctly applied resulting in injustice to the appellant.

Given the conclusions above, I do not find it necessary to consider the issue of sentence. It is sufficient, for the reasons stated, to allow the appeal. The conviction is hereby quashed and the sentence set aside.

Abdul Malek Ahmad FCJ:. The appellant is an advocate and solicitor of considerable standing and was one of several counsel representing the former Deputy Prime Minister and Minister of Finance who was being tried for four offences under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 when this whole unhappy episode took place.

In the course of the trial, on 28 November 1998 to be exact, the appellant had filed, on behalf of his client, a motion praying for an order that Senior Deputy Public Prosecutors Dato' Abdul Gani Patail and En Azahar bin Mohamed, who were members of the prosecution team in that trial, be prevented or prohibited or discharged from further prosecuting in that case and that the matter of the conduct of the two said deputy public prosecutors be referred to the Attorney General with a view to such action as may be appropriate to be taken against them.

The relevant paragraphs of the client's affidavit filed on the same date in support of the motion read as follows:

> 13 I am advised by one of my counsel in my trial herein, that the evidence which Mr Manjeet Singh Dhillon had sought to give in the Nallakaruppan trial is as stated in a statutory declaration which he had affirmed on 9 November 1998, and is to the effect:
>
> (a) that at a meeting he had at the Attorney General's Chambers on 2 October 1998 (when he had requested that the charge against Dato' Nallakaruppan be reduced to one which is not punishable with the death penalty), the aforesaid Dato' Abdul Gani Patail had indicated that he would consider the request if Datuk Nallakaruppan was prepared to cooperate with the Attorney General's Chambers by falsely implicating me in the commission of sexual offences with various married and unmarried women;
>
> (b) that present at this meeting was Mr Balwant Singh Sidhu, co-counsel for Datuk Nallakaruppan;
>
> (c) that En Azhar bin Mohamed, another senior deputy public prosecutor subsequently made a similar demand as Dato' Abdul Gani Patail to Mr Manjeet Singh Dhillon;
>
> (d) that an account of what had transpired at the meeting aforesaid had been set out in a letter which Mr Manjeet Singh Dhillon had sent to the Attorney General dated 12 October 1998 to which he had yet to receive a reply from the Attorney General.
>
> Now produced and shown to me is the said statutory declaration of Mr Manjeet Singh Dhillon affirmed on 9 November 1998, herein marked exh 'DSAI-2'.
>
> 14 Dato' Abdul Gani Patail is the leading prosecutor in my trial herein, with En Azahar bin Mohamed the next senior prosecutor.
>
> 15 It is clear from statements which have been made publicly by various personalities, that my trial on these charges has very heavy political overtones. Notwithstanding that, it is as much the duty of every prosecutor involved in the proceeding herein, as it is the duty of this court, to discharge his functions fairly and professionally.
>
> 16 Their conduct referred to above shows both Dato' Abdul Gani Patail and En Azahar bin Mohamed to have abused their positions as officers of the Attorney General's Chambers and as prosecutors in my trial herein, by going out of their way to get Datuk Nallakaruppan to fabricate evidence in order to prefer more charges against me for other alleged sexual offences.
>
> 17 I do not believe that it is in the best interest of justice for Dato' Abdul Gani Patail and En Azahar bin Mohamed to continue to conduct the current prosecution against me.

18 Having shown themselves to be highly unprofessional in the performance of their duties and to be personally interested to secure my conviction by questionable means, their involvement in my trial herein has already raised grave doubts as to the integrity of the evidence which has so far been adduced by the prosecution.

19 I verily believe that their continuing to be prosecutors in my trial herein will pervert the administration, and will result in a travesty, of justice.

20 In the premises, I pray for an order in the terms of the application herein.

It is certainly relevant to reproduce the statutory declaration dated 9 November 1998, affirmed by Manjeet Singh Dhillon ('MSD') to get a clearer picture of the allegation. The said statutory declaration states:

STATUTORY DECLARATION

I, Manjeet Singh Dhillon (NRIC No 0248545) of c/o Room 308, Third Floor, Bangunan Yayasan Selangor, Jalan Bukit Bintang, 55100 Kuala Lumpur, of full age and a Malaysian citizen, do hereby declare and say as follows:

1 I am an advocate and solicitor of the High Court of Malaya with an address for practice at Room 308, Bangunan Yayasan Selangor, Jalan Bukit Bintang, 55100 Kuala Lumpur and the facts deposed to in this statutory declaration are within my own knowledge.

2 I am retained as counsel for Datuk Nallakaruppan a/l Solaimalai in Kuala Lumpur High Court Criminal Trial No 45–40–1998 which is scheduled for hearing from 9 November 1998 onwards.

3 I wrote the letter annexed hereto as 'MSD-1', the contents of which are self-explanatory, and delivered it personally to the Honourable Attorney General, Tan Sri Mohtar Abdullah on 12 October 1998 at about 9.30am.

4 Pursuant to the letter being delivered, and as a result of an invitation from him to do so, I met with the Honourable Attorney General at about 11.00am on 13 October 1998. This invitation to meet him, alone, was conveyed through his secretary.

5 At the meeting the Honourable Attorney General never questioned or disputed my allegations against Dato' Abdul Gani Patail. Instead the conversation covered, among other things, the work that he, the Honourable Attorney General, was doing to improve the set-up and efficiency of his department. Only at the tail end of our meeting did the Honourable Attorney General allude to my letter and say that the letter was not very clear as to how my client would plead to an amended charge under the Arms Act. My response to that was that the client would enter a plea of guilty to an amended charge under the Arms Act. He asked for a letter confirming this and said that either he or Azahar would revert to me after that.

6 On 14 October 1998, I wrote a short letter to the Honourable Attorney General confirming my statement that the client would plead guilty. A copy of this letter is annexed hereto as MSD-2.

7 I telephoned and spoke to the Azahar indicated by the Honourable Attorney General. This was on 16 October 1998. The 'Azahar' in question is En Azahar bin Mohamed, Ketua Bahagian Pendakwaan. Encik Azahar confirmed receipt of my letter dated 14 October 1998, and he knew about my meeting the Honourable Attorney General on 13 October 1998. He went on, in the same conversation, to state that

there would have to 'be something else (ie more than just a plea of guilt to an amended charge)' and that he would revert when he had instructions. This 'something else' asked for by En Azahar was obviously what Dato' Abdul Gani had asked for, on 2 October 1998 and confirmed to me a common approach to extracting evidence from Nallakaruppan a/l Solaimalai by using the ISA 'death threat' as their bargaining chip.

8 I had conveyed Dato' Abdul Gani's demands to my client on the afternoon of 13 October 1998. There was little that Nallakaruppan could have done to satisfy Dato' Abdul Gani or Azahar since he had nothing to give them that would have matched their demands, short of lying.

9 I did not hear from the Honourable Attorney General or En Azahar, and so on or about the 21 October 1998, I telephoned and spoke to the Honourable Attorney General. He said that he made no decision and asked for a further week.

10 There was no further response, and so on 28 October 1998, I sent the Honourable Attorney General a reminder. I received a reply dated 29 October 1998 signed by En Azahar bin Mohamed rejecting the request for an amendment of the charge. This rejection letter is annexed hereto as 'MSD-3' and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1960.

Subscribed and solemnly declared by:
The above-mentioned Manjeet Singh Dhillon

Sgd
(NRIC No 0248545) at Kuala Lumpur)
Wilayah Persekutuan,
This 9th day of November 1998

Before me,
Sgd
(Signature of judge of sessions court, magistrate or commissioner for oaths)

It is also necessary to reproduce, despite its length, MSD's earlier letter to the Attorney General dated 12 October 1998. In fact, it would be incomplete not to do so. The letter reads:

MANJEET SINGH DHILLON ADVOCATE & SOLICITOR

YAB Tan Sri Mohtar bin Abdullah
Peguam Negara
Bangunan Bank Rakyat
Jalan Tangsi
Kuala Lumpur

PRIVATE & CONFIDENTIAL

12 October 1998

PERSONAL/FOR YOUR EYES ONLY/BY HAND

Tan Sri,
Re: PP v Nallakaruppan a/l Solaimalai
KL High Court Criminal Trial No 45–40–98

At the very outset let me apologize for writing this letter in English. I would under normal circumstances have arranged for my staff to translate it into Bahasa but there are matters that I am about to set out that for the moment I

feel are best left on a p & c basis. Hence the need to keep the letter away from my staff. I have even taken the precaution of hand-delivering this letter myself.

You will recollect that I wrote to you on 1 October 1998 on the above matter citing the recent prosecution of Samsuri Welch Abdullah under the Arms Act 1960 as a comparative basis for you to amend the charge against Nallakaruppan from the Internal Security Act 1960 to one under the Arms Act 1960. I had copied that letter to Dato' Abdul Gani Patail.

I had expected a response from your office but instead, as in the case of my first letter dated 17 August 1998, I had a call from Dato' Abdul Gani Patail on 2 October 1998 asking to see me on a very urgent basis. Both Mr Balwant Singh Sidhu and I saw him at 3.20pm on 2 October 1998. The date and time of this visit is recorded in the police log book maintained outside Dato' Abdul Gani's office on the 17 Floor of Bangunan Bank Rakyat.

I had gone to this meeting with the expectation that, on the basis of my first October letter, there would be some discussion about possible sections under the Arms Act 1960 with a view to an amendment of Nallakaruppan's present ISA charge. To my absolute horror and disappointment Dato' Abdul Gani Patail used the meeting and the death sentence under s 57 of the ISA as a bargaining tool to gather evidence against Dato' Seri Anwar Ibrahim.

He had with him the letter I had written to you and copied to him. He was waving the letter about and kept on saying repeatedly, 'I am not impressed' and suggesting that he would not be impressed with any plea to a charge under the Arms Act but instead wanted more. This 'more', and it came across very loud and clear because Dato' Abdul Gani laid it out in very clear and definite terms, was:

1 That Nallakaruppan was now facing the death sentence.

2 That there were other charges also under the ISA that he could prefer against Nallakaruppan but that if they [A-G's chambers?] hanged him once under the present charge what need would there be to charge him for anything else.

3 That in exchange for a reduction of the present charge to one under the Arms Act he wanted Nallakaruppan to co-operate with them and to give information against Anwar Ibrahim, specifically on matters concerning several married women. Dato' Abdul Gani Patail kept changing the number of women and finally settled on five, three married and two unmarried.

4 That he would expect Nallakaruppan to testify against Anwar in respect of these women.

I was shocked that Dato' Abdul Gani Patail even had the gall to make such a suggestion to me. He obviously does not know me. I do not approve of such extraction of evidence against ANYONE, not even, or should I say least of all, a beggar picked up off the streets. A man's life, or for that matter even his freedom, is not a tool for prosecution agencies to use as a bargaining chip. No jurisprudential system will condone such an act.

It is blackmail and extortion of the highest culpability and my greatest disappointment is that a once independent agency that I worked with some 25 years ago and of which I have such satisfying memories has descended to such levels in the creation and collection of evidence. To use the death threat as a means to the extortion of evidence that is otherwise not there [why else make such a demand?]. It is unforgivable and surely must in itself be a crime, leave

alone a sin, of the greatest magnitude. Whether his means justify the end that he seeks are matters that Dato' Abdul Gani Patail will have to wrestle with within his own conscience.

I have agonized over this machinations of Dato' Abdul Gani Patail's for the last 10 days. I have known you for close to 26 years. I cannot imagine you condoning such an act. And so this third and final letter on this matter and my decision to let you know what transpired on the afternoon of 2 October 1998. How far into your Chambers the corruption has spread I cannot say but that you will have to stop it goes without saying.

Nallakaruppan does not deserve the charge under the ISA bearing in mind what I have set out above and what is tabulated below. The facts relating to the 125 bullets have been set out in my earlier two letters. In my second letter I mentioned the Samsuri Welch Abdullah charges. I have since researched into the Arms Act prosecutions by your Department over the last few years but because of the constraint of time have only been able to go back till 1993, a period well within your tenure as Attorney General. I have chronologically listed out below all the cases reported in the local papers that I have been able to locate. All that is important at this juncture is to note that even in matters of far greater magnitude you have chosen the Arms Act as the vehicle for your prosecutions.

(Annexures noted)

Samsuri Welch Abdullah had exceptionally large quantities of ammunition that had no relevance to his pistols. Vincent Teo's prosecutions listed above ['E' & 'H'] assume even greater significance. He was involved in gun smuggling and the illegal sale and disposal of about 240 guns together with Dato' Alfred Chin [who was related to a senior police officer], a fact highlighted by the Director of the CID, Malaysia in a press release dated 27 May 1996 [please see *The Star* clipping dated 28 May 1996 annexed to this letter as 'K']. That is by any stretch of the imagination a colossal amount of firearms, enough to equip a small army. If such a matter only warranted the Arms Act, then surely 125 bullets acquired under a licence where the licence has expired cannot warrant the ISA.

This then makes the last case ['J'] listed above very relevant to your deliberations. This was an instance where the gun permit had expired and had not been renewed. The charge that was framed against Dato' Johari under s 8(a) was for failing to renew his permit between July 1983 and 27 March 1984 when the gun was found in the Regent Hotel toilet.

In the circumstances I will be grateful if you could give this matter your urgent and personal attention. On the available facts a charge under Arms Act 1960, as in Dato' Johari's case above, will be the most appropriate and no extraneous matters should be taken into consideration in the framing of the charge. In the event that your direction is favourable, the matter could be called up at short notice, perhaps even before Deepavali, with a view to a prompt and early resolution. This will free the court of the earlier trial dates fixed and save considerable time and expense all around.

Thank you.

Yours faithfully,
Sgd,
Manjeet Singh Dhillon

The appellant's client had in all been charged for five corruption and five sodomy charges and all along he had alleged that all these charges were

trumped up. It is, therefore, not that suprising that when he came across this evidence, it had propelled him to take the action he did through the appellant.

It is interesting to note that the relevant trial against the appellant's client had started on 2 November 1998 and the motion was filed on 28 November 1998. This happened to be a Saturday but the trial judge apparently felt that it was very urgent when he fixed it for the following Monday. In fact, on that very morning he had said:

> Court: I am surprised that this notice of motion has been filed as in meetings that I had with counsel in chambers they have expressed satisfaction with the conduct of the proceedings and that the prosecution is fair including a statement that we have a very fair Attorney General. I had intended to adjourn the hearing of this application to a later date. But the blaze of publicity that has been given to it warrants immediate action.

Following from that, as can be gathered from the notes of evidence, the learned trial judge and the appellant were engaged in the following dialogue: The learned trial judge pronounced:

Court to En Zainur Zakaria	:	This notice of motion has been filed by you and you have to assume full responsibility for it.
Court	:	Please read the Statutory Declaration of Mr Manjeet Singh and his letter to the A-G which form the basis of your application.
En Zainur	:	Counsel who is arguing this application is YM Raja Aziz Addruse and Tuan Hj Sulaiman Abdullah.
Raja Aziz	:	The course of action Your Lordship is taking is most unusual. We have an application based on a statutory declaration which is admissible. It is not right to deal with a solicitor at this stage for filing it unless your Lordship propose to bring charges which we can defend.
Court	:	I intend to do that.

(Encik Zainur Zakaria reads the statutory declaration and the letter from Mr Manjeet Singh to A-G.)

Court	:	The basis of your application are these two documents.
En Zainur	:	Yes.
Court	:	I believe you are aware of the law relating to accomplice evidence and the right of the Public Prosecutor to reduce a charge or not to charge a person if he cooperates and provides information to the police.

A

En Zainur	:	I am not obliged to answer that question.

(Court reads law from various textbooks.)

Court to En Zainur :		Please read paras 13, 16 and 18 of the affidavit (En Zainur reads).

B

Court	:	Are these allegations made in the affidavit supported by the documents that you are relying on?
En Zainur	:	Yes. By reading the statutory declaration and the letter, in particular para 2 of letter. In this paragraph, Mr Manjeet says — para 3 — the whole of it. En Zainur reads para 3. En Zainur reads para 4.

C

Court	:	Do you agree that para 4 is Mr Manjeet's conclusion and has nothing to do with his meeting with Gani Patail?

D

En Zainur	:	From what I understand from para 4 it was the conclusion based on the meeting between Mr Manjeet and Gani Patail. I agree that para 4 is Mr Manjeet's own conclusion.
Court	:	Now I take you to para 3. Which part of para 3 suggests that there was a request to fabricate evidence?

E

En Zainur	:	Para 3 must be read with para 4. In para 3 it is point (3) (he reads: That in exchange for reduction of the present charge to one under the Arms Act he wanted Nallakaruppan to cooperate with them and to give information against Anwar Ibrahim, specifically on matters concerning several married women, Dato' Abdul Gani Patail kept changing the number of women and finally settled on five, three married and two unmarried. Point (4): That he would expect Nallakaruppan to testify against Anwar in respect of these women.

F

G

Court	:	Does item 3 in para 3 suggest that there was a request to fabricate evidence?
En Zainur	:	It must be read with para 4.
Court	:	Do you realize that the detailed questioning that I am embarking is to find out whether you filed an application without much thought in which event this court may be merciful with you?

H

Court	:	Where does para 3 suggest that a request was made to fabricate evidence?

I

En Zainur	:	Para 3 and para 4 should be read together and when Mr Manjeet referred to the 'creation' of evidence he was referring to use of death threat. The use of the words 'creation and collection of evidence which is otherwise not there' suggests that Nalla was requested to give evidence against Dato' Seri Anwar.
Court	:	You say 'to give evidence' — nothing wrong with that. Where is the evidence to show that there was a request to fabricate evidence?
Raja Aziz	:	This is unusual procedure.
Tan Sri A-G	:	I agree it is unusual. When I asked to sit I sat.
En Zainur	:	In para 4 the use of the words to 'create evidence' means Nalla is asked to create evidence.
Court	:	I refer you to para 8 of Mr Manjeet's statutory declaration.
En Zainur	:	This shows that Datuk Nalla could not give the evidence and there was no such evidence and would mean he is lying.
Court	:	Are you satisfied that the two documents in question suggest that there was a request to fabricate evidence?
En Zainur	:	Yes .

This application with its affidavit in support is an interference with the course of justice as it has no basis. (I explain). It therefore amounts to a pre-emptive step to undermine the integrity of a trial in progress. The object is to project an impression that the prosecution is anchored on fabricated evidence. This is a serious contempt and I have to act on it with all urgency to preserve the integrity of this trial. As I said in the early stage of this trial I will not hesitate to flex every inch of my judicial muscle to ensure that this trial proceeds smoothly. It is my duty to guarantee that persons who are following this trial are not hoodwinked in any way. With the application of this nature to muddy the smooth flow of justice, I would not be surprised if a similar application is made to have me disqualified from hearing this case. In the light of the baseless application filed by you which is totally unsupported by the documents exhibited by you I propose to cite you for contempt for having attempted to undermine the integrity of this trial. Before I do so this court will show mercy towards you by dropping all further proceedings if you tender an unconditional apology to this court, to the A-G, to Dato' Abdul Gani Patail and to En Azahar for filing an application which is absolutely baseless and which is an abuse of the process of court. (Court to adjourn for half an hour to enable En Zainur to think about it).

After a short adjournment to enable the appellant to consider tendering his apology, the appellant informed the court that he was not able to. He was

promptly cited for contempt by the court. The appellant's learned counsel Raja Aziz Addruse then said:

> In view of the turn of events and the fact that part of the charge preferred state that the documents filed contain scandalous allegations we propose to adduce evidence to show that the meeting referred to by Mr Manjeet Singh Dhillon in his statutory declaration did take place. So we would like to be given time to prepare our defence and Zainur Zakaria should be allowed time to defend himself. I quite understand that the main trial cannot be interrupted but just as the accused person in the main trial must be given time to prepare his defence Zainur Zakaria should be accorded the same consideration because equally his liberty is at stake. It would be quite unjust to require him and his counsel to answer this charge immediately. Even apart from the facts important issue of law are involved. So I ask for hearing to be adjourned. Request for a day or two.

The response from the learned Attorney General was as follows:

Tan Sri A-G	:	Contempt proceeding is initiated by court. We are not parties. We had intended to apply for contempt ourselves. I shall address court if invited to do by court.
Court	:	I invite you to assist the court as at a later stage you may be involved in this matter.
Tan Sri A-G	:	My brief answer is that this contempt is contempt in the face of the court and is not something that happened outside. In cases of contempt in the face of the court it must be dealt with immediately. This contempt derails justice and requires immediate action. The respondent can explain. This is not a full trial. No need to call witnesses.

Raja Aziz then submitted in the following manner:

Raja Aziz	:	There are different types of contempt in the face of the court. If a witness or accused should behave in a disgraceful way in court, say if he throws a shoe at the court, that is contempt in the face of the court to be dealt with immediately. Here an application has been made to court supported by a statutory declaration and it is said that the evidence in support contains scandalous allegations. The position is not the same. We should have been heard that allegations are scandalous. The learned A-G talks of show cause procedure whether court is satisfied of explanation. If that is the test, the court is already satisfied. This matter should be looked at more seriously and we intend to deal with it seriously. In an application of this nature where there is alleged in the communication that the course of justice is being perverted one should not dismiss those allegations easily.

The application for an adjournment was refused and the appellant gave the following evidence:

> Zainur Zakaria
> A/S English
>
> Advocate and Solicitor
>
> The application was filed upon instructions of my client, Dato' Seri Anwar Ibrahim. And I did so in the discharge of my professional duty. The obligations of an advocate and solicitor is not only found in common law but in our case is also, if I may say, enshrined in our Legal Profession Act, if I am not mistaken s 42 requires an advocate and solicitor to uphold justice without fear or favour. That was my objective in filing this application.

The subsequent notes of evidence detail what happened next:

Raja Aziz	:	As a team of lawyers for the defence, matters of this nature are normally discussed between all of us. In this case, I was consulted in the affidavit and settled it. The legal position regarding the points made in Mr Manjeet Singh's statutory declaration was also very carefully considered. In considering communications which are of a confidential nature the court has set out a number of exceptions to the confidentiality of the communication. We should listen to the evidence. Court has to call witnesses.
Q	:	Whether this court finds it necessary to call Mr Manjeet Singh and others to explain the views held by the court.
Court	:	It is unnecessary as all documents are before me and also in the light of the explanation given by En Zainur.
Court	:	Guilty. Do you wish to address on sentence?
En Zainur	:	It was not the intention to commit contempt. When the defence team studied the application before filing it was based on the documents exhibited. Our instructions were based on the documents. In the interest of justice it was felt this matter must be brought to attention of court.
Court	:	You do not wish to tender an apology in the terms that I described earlier?
En Zainur	:	I regret I am unable to do that.

Convicted.

Sentence — three months imprisonment.

As submitted by learned leading counsel Raja Aziz Addruse, both the learned trial judge in the High Court and the learned judges in the Court of Appeal proceeded on the premise that the allegations on which the

application was based were baseless, that the filing of the application was an attempt to undermine the ongoing trial of the appellant's client and that the appellant, in filing the application, committed contempt of court. He was of the view that the learned judges had misdirected themselves on the principle laid down by *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54 and *Attorney General v Butterworth & Ors* [1963] 1 QB 696.

In the former case, Lord Morris of Borth-Y-Gest had said at p 66:

> My Lords, the phrase contempt of court is one which is compendious to include not only disobedience to orders of a court but also certain types of behaviour or varieties of publications in reference to proceedings before courts of law which overstep the bounds which liberty permits. In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community, it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognized courts of the land are so flouted that their authority wanes and is supplanted. But as the purpose and existence of courts of law is to preserve freedom within the law for all well disposed members of the community, it is manifest that the courts must never impose any limitations of free speech or free discussion or free criticism beyond those which are absolutely necessary. When therefore a court has to consider the propriety of some conduct or speech or writing decision will often depend on whether one aspect on the public interest definitely outweighs another aspect of the public interest. Certain aspects of the public interest will be relevant in deciding and assessing whether there has been contempt of court. But this does not mean that if some conduct ought to be stigmatised as being contempt of court it could receive absolution and be regarded as legitimate because it had been inspired by a desire to bring about a relief of some distress that was a matter of public sympathy and concern. There can be no such thing as a justifiable contempt of court.

In that same case, Lord Diplock had remarked at p 72:

> The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.

The opening paragraph of Pearson LJ's, speech in the latter case was:

> I agree. No question of a discretionary choice between alternative procedures has been raised in this appeal. It appears from the findings of the Restrictive

Practices Court that after the conclusion of the proceedings relating to the agreement known as RENA, some of the respondents removed Greenlees from certain offices for the purpose of punishing him for the evidence which he had given in those proceedings. The Attorney General has contended that on those findings contempt of court was established, and that the court could and should have dealt with it summarily in the exercise of their inherent jurisdiction. On behalf of the respondents, Mr Aldous has contended that the court's inherent jurisdiction to deal with contempt of court is limited to two classes of cases, namely, those in which there is a scandalising of the court and those in which there is prejudice to pending proceedings, and that the jurisdiction does not extend to a case in which after the conclusion of the proceedings some person is victimised for what he did as witness or juror in those proceedings. In my judgment, however, such victimisation, because it tends to deter persons from giving evidence as witnesses in future proceedings, and giving that evidence frankly and fully and without fear of consequences, is an interference with the due administration of justice as a continuing process, and does constitute contempt of court and can be dealt with summarily under the inherent jurisdiction.

Lord Ackner in *Attorney General v Times Newspapers Ltd & Anor* [1992] 1 AC 191 at pp 207 and 208 discussed the point in the following manner:

The concept of contempt of court

The term 'contempt of court' is of ancient origin having been used in England certainly since the thirteenth century and probably earlier. The term has been criticised as inaccurate and misleading, suggesting in some contexts that it exists to protect the dignity of the judges. Over 100 years ago, Bowen LJ explained in *Re Johnson* (1887) 20 QBD 68 at p 74:

> 'The law has armed the High Court of Justice with the power and imposed on it the duty of preventing … any attempt to interfere with the administration of justice. It is on that ground, and not on any exaggerated notion of the dignity of individuals that insults to judges are not allowed. It is on the same ground that insults to witnesses or to jurymen are not allowed.'

Nearly 70 years ago a similar comment was made by Lord President Clyde in *Johnson v Grant* 1923 SC 789. He said, at p 790:

> 'The phrase "contempt of court" does not in the least describe the true nature of the class of offence with which we are here concerned … The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice. … It is not the dignity of the court which is offended — a petty and misleading view of the issues involved — it is the fundamental supremacy of the law which is challenged.'

Approaching 50 years later in *Morris v Crown Office* [1970] 2 QB 114 at p 129 Salmon LJ observed:

> 'The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented.'

Shortly thereafter Lord Cross of Chelsea, in *Attorney General v Times Newspapers Ltd* [1974] AC 273 at p 322, commented:

> ' "Contempt of court" means an interference with the administration of justice and it is unfortunate that the offence should continue to be known

A by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court. Nowadays when sympathy is readily accorded to anyone who defies constituted authority the very name of the offence predisposes many people in favour of the alleged offender. Yet the due administration of justice is something which all citizens, whether on the left or the right or in the centre, should be anxious to safeguard.'

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The principle which these cases enunciate, learned counsel had continued, is that all citizens have an unhindered access to constitutionally constituted courts for the determination of disputes as to their rights and liabilities. Where else could the appellant's client resort to on being aware of MSD's letter and statutory declaration?

C

The judgment of the Court of Appeal at pp 14 and 15 of the first volume of the Appeal Record had this to say at p 144:

In response to this submission, the learned counsel for the respondent argued that the relevant parts of the SD and 'MSD-1' did not support the appellant's contention that the two DPPs were trying to fabricate evidence against DSAI. The respondent contended further that an offence under s 498 Penal Code (ie enticing of married women) was disclosed by ID14B. Under the circumstances, the respondent contended that the application of the appellant had the effect of trying to influence the learned judge to hold the view that the evidence so far tendered before him were fabricated. This, consequently, it was submitted had a tendency to obstruct the ordinary course of justice or to prejudice the trial before the learned judge. As such, the respondent argued that the learned judge had the power and duty to summarily deal with the appellant for contempt.

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E

The learned judge in his grounds of judgment referred to *Attorney General v Times Newspapers Ltd* [1974] AC 273 at p 302 as an authority on the purpose of contempt proceedings. The learned judge then quoted from Lord Russel's judgment in *R v Gray* [1900] 2 QB 36 to show what acts constitute contempt of court. We are accordingly of the view that the learned judge has not erred in his perception of the meaning of contempt of court. In fact, Lord Cross of Chelsea in *Attorney General v Times Newspapers Ltd* said, at p 322:

F

'… "Contempt of court" means an interference with the administration of justice …'

G

In the notes of evidence, the learned judge stated that the application of DSAI was baseless because it was totally unsupported by the documents exhibited therein. Accordingly the learned judge held that the application was an attempt to undermine the integrity of the trial of DSAI and also an abuse of the process of court. Thus, according to the learned judge, the appellant had committed contempt of court.

H

In a later part of the judgment, the learned judges quoted the findings of the learned trial judge as follows at p 144:

…the conclusion of MSD as contained in para 4 of the letter may be justifiable only if it was arrived at after he had discussed the matter with his client in order to ascertain what the latter knew. The letter is dated 12 October 1998. However, para 8 of the SD states that MSD met his client on 13 October 1998 to convey AGP's demands to him. This shows that MSD came to his conclusion even before he had discussed the matter with his client to find out

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what the latter knew. I find support for this in para 8 of the SD where MSD had said that there was nothing that his client could have done '… short of lying'. This clearly indicated that up to the 13th MSD did not know what his client knew. It cannot be assumed that MSD was aware of what his client knew at that point of time as otherwise there would have been no need for him to refer the matter to his client which he did. For MSD, therefore, to refer to '… *the extortion of evidence that otherwise not there* …' is ill-advised.

The learned judge then concluded thus:

> 'In my opinion there is no indication, explicit or subtle, direct or indirect, in the request for information against the accused by AGP for the giving of any false information, it was an exercise of lawful powers with no undertones of any impropriety. The conversation that transpired at the meeting as described in para 3 of the letter ought to have made this plain and patent even to the most uninitiated. It follows that the reading of anything else into para 3 of the letter is an act of bad faith calculated to undermine the administration of justice.'

Their conclusion at p 145, was:

> Clearly therefore, the appellant's allegation of fabrication of evidence by the two deputy public prosecutors as contained in the affidavit in support of the application, are not supported by the SD and 'MSD-1'. Consequently, this act of the appellant is obviously, as correctly put by the learned judge, an act of bad faith. Under such circumstances, we agree with the learned judge when he held that the appellant's application was an attempt to undermine the integrity of the trial of DSAI and abuse of the process of court. We are, in fact, of the view that the appellant's act and conduct are inherently likely to interfere with the administration of justice as a continuing process in the lower court (*Attorney General v Butterworth* [1963] 1 QB 696).

The appellant's petition of appeal highlighted the fact that the learned judges of the Court of Appeal erred in law and in fact:

(a) in holding that the appellant was reckless and negligent in filing the application to disqualify the two prosecutors and in so doing inter alia erred in considering the purport and effect of the relevant exhibit that was tendered at the trial of the appellant's client before the learned trial judge and erred in having taken in consideration that exhibit;

(b) when they misdirected themselves on the powers of public prosecutors in regard to plea bargaining or plea negotiations, and erred in not considering the fact that the learned trial judge came to a conclusion on the issue of accomplices, without any or sufficient evidence before him;

(c) in holding that the filing of the application by the appellant's firm was an act of bad faith by the appellant and in so doing inter alia did not appreciate the purport and effect of MSD's letter dated 12 October 1998 or MSD's statutory declaration dated 9 November 1998 and did not appreciate that the letter and statutory declaration provided prima facie adequate grounds for the filing of the application, or erred in construing the contents of the letter and statutory declaration given that the application filed by the appellant's firm was never heard on the merits before the learned trial judge;

(d) in holding that the application was an attempt to undermine the integrity of the High Court trial, abuse of the process of court, an interference with

A the administration of justice and prejudicial to the prosecution in the High Court trial;

(e) in holding that the acts and conduct of the appellant, on behalf of his client in making the application, constituted a contempt of court;

(f) in holding that it was unnecessary for the learned trial judge to allow the calling of witnesses and hearing of submissions to properly determine the purport of the letter and statutory declaration and the events that were said to have transpired in them;

(g) in holding that the charge against the appellant was sufficiently particularized by the learned trial judge;

(h) when they did not consider that by the time the learned trial judge had framed the charge against the appellant, he had already expressed the view that the appellant had committed a serious contempt by filing the application;

(i) in holding that the element of mens rea was immaterial in such a contempt of court;

(j) in holding that the appellant ought properly to have advised his client not to file the application given that he was aware of the affidavit and the conclusions in the letter and statutory declaration, and in so doing inter alia failed to appreciate the duties of the appellant as an advocate and solicitor, failed to consider that the appellant had sought the advice of counsel on the application and failed to appreciate the effect and purport of the letter and statutory declaration as a whole;

(k) in holding that the learned trial judge correctly used a summary procedure for convicting the appellant for contempt of court and in so doing inter alia failed to consider that the learned trial judge could have proceeded with the High Court trial and failed to consider that the learned trial judge ought properly to have allowed the appellant an adjournment to prepare his defence and to call witnesses;

(l) in holding that given an increase in contempt offences by advocates and solicitors, a custodial sentence for the appellant was justified; and

(m) given the circumstances, in holding that an apology by the appellant would have an effect on the nature of the punishment.

The relevant question, as learned counsel put it, would be whether the appellant's client, by whom the application was made, had the right to complain to the High Court with regard to the alleged conduct of the two prosecutors and whether he had grounds for making the application. If he had the right to make a complaint and if he had acted properly in making the application, then the appellant's act of filing the application on his client's behalf could not have constituted an interference with the administration of justice and, consequently, contempt of court.

What merits consideration first is whether there was evidence to support the application to disqualify the two prosecutors. One only need to read MSD's letter and statutory declaration to appreciate the fact that this cannot be a baseless allegation. In consequence, there is really no basis to find that the appellant had acted in bad faith in filing the application on behalf of his client.

Learned counsel Haji Sulaiman Abdullah stressed that the fundamental principle was that a person accused of a crime must have the best possible

defence. Emphasizing the fact that the appellant was only the solicitor acting for his client, he submitted that where there are two possible interpretations, the doubt must be given to the accused. Questioning whether the appellant, as solicitor, had interfered with the ongoing trial, he said that it is never the intention of any lawyer to engage in this sort of contest with the judge.

Learned counsel further argued, and this was very important, that the overriding factor in the four charges against the appellant's client was sexual misconduct. The defence, in essence, was that there was no truth in the trumped up charges and that all the evidence was fabricated. Being aware of MSD's letter and statutory declaration, which naturally confirmed the suspicions of the appellant's client, it was natural for the client to be overly anxious about the proceedings against him. In doing what he did, can he be said to be interfering with the administration of justice?

Much has been said about accomplice evidence but whether or not Datuk Nallakaruppan was an accomplice or otherwise is clearly of no relevance. The main issue is the conduct of two of the prosecutors in the prosecution team striking a bargain to get further evidence, fabricated at that, against the appellant's client in exchange for a reduction for the death penalty charge then levelled at Datuk Nallakaruppan.

Apart from the fact that the application was filed on Saturday and the hearing took place on the following Monday, the notes of evidence, the reproduction of which earlier in this judgment was for the sole purpose of illustrating the point, clearly showed that the trial judge, despite the intervening day being a Sunday, was quite well prepared for the event. The manner he conducted the proceedings, in particular the interrogation of the appellant and the speedy finding of guilt without even allowing the appellant to call any witness, gave the picture that he was behaving as though he was acting as counsel for the two prosecutors in the motion.

He had then immediately decided that the appellant had committed contempt before even framing the charge, and a defective charge at that. But after the appellant had given evidence, he had refused an adjournment to call relevant witnesses. Surely MSD himself could have shed some light on the matter. Getting the two named prosecutors to testify to clarify the position would certainly be the correct thing to do.

Re Bramblevale Ltd [1970] Ch 128 had decided that in contempt of court cases, proof must be beyond reasonable doubt. This certainly was not the case here and the learned trial judge did not at all allude to the burden of proof in his judgment. On the allegations made, there was really no basis for the appellant to explain or to apologize.

Apart from the fact that at the relevant time there had been no denials from the two prosecutors and in fact even from MSD, the learned trial judge, in carrying out his summary procedure, demanded an apology from the appellant. The effect of this demand would mean that contempt had taken place which is the very thing denied. There has been a blatant disregard of rules of procedure and considering the frame of mind the learned trial judge was in, he should have been the last person to deal with the contempt issue.

A Having held the allegations were baseless despite not calling for further evidence to support this, the learned trial judge had ruled that the motion should not have been filed. Since the procedure taken was wrong and the matter had certainly not been proved beyond reasonable doubt, the learned trial judge fell into error in deciding that contempt of court had taken place. Imposing a sentence of three months imprisonment was definitely the wrong icing to the cake.

In writing this judgment, it has been found necessary to reproduce a major portion of the appellant's client's affidavit, and MSD's letter and statutory declaration and the notes of proceedings in full, so as to get the correct picture of how the contempt proceedings took place. Doing otherwise would have created a different effect altogether.

In the light of all observations made, the conduct of the learned trial judge himself had vitiated the contempt proceedings. It is obvious that the Court of Appeal, in merely agreeing with the trial judge, fell into the same error.

D This appeal must be allowed. Accordingly, the conviction is quashed and the sentence set aside.

Haidar FCJ:. I have had the advantage of reading the draft judgment of the learned Chief Judge (Sabah & Sarawak). I agree with him that this appeal should be allowed. I would, however, like to add the following.

E The application made by Dato' Seri Anwar Ibrahim ('DSAI') and filed by the appellant's firm on his behalf as his solicitor that resulted in the contempt proceedings against the appellant and his subsequent conviction raises, inter alia, the issue of the liability of an advocate and solicitor vis-a-vis his client.

F Quite apart from that, the application is rather an unusual one. I say so because, if I am not wrong, this is the first time that I have come across an application to disqualify prosecutors from further prosecuting in a criminal case at the instance of an accused person ('DSAI') which landed not DSAI but his counsel (the appellant) for contempt of court on the premise that such an application tend to interfere with the administration of justice.

G The role of the appellant as an advocate and solicitor is governed by the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). In respect of the appellant's role in this appeal, the relevant rules are rr 9 and 16, which are:

> 9 Advocate and solicitor to undertake defence fairly and honourably
>
> (a) An advocate and solicitor who undertakes the defence of a person in any criminal matter shall by all fair and honourable means present every defence that the law permits.
>
> (b) An advocate and solicitor shall undertake the defence of a person accused of an offence regardless of his personal opinion as to the guilt or otherwise of the accused.

H

> 16 Advocate and solicitor to uphold interest of client, justice and dignity of profession
>
> An advocate and solicitor shall while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his

I

> client, the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.

The conduct of the appellant in the High Court was not an issue but the application of DSAI, through the appellant's firm, was as far as the learned High Court judge was concerned. One thing that needs to be clearly noted is that the complaint was not against the judge or court or touching on the proceedings per se.

It was a complaint against the conduct of the two prosecutors in the case against DSAI and for an order that they be prevented or prohibited or discharged from further conducting the case against DSAI, and also for their conduct to be referred to the Attorney General for an appropriate action to be taken.

The first question that comes to my mind is whether DSAI can make such a complaint to the court and if so, whether there are adequate grounds for it or is it to undermine or interfere with the administration of justice. It is in this context that I have to examine the liability of the appellant as counsel/solicitor to DSAI.

Let me first consider the legislation pertaining to the duties of an advocate and solicitor towards his client.

Rules 9 and 16 of the Rules clearly set out the responsibilities of an advocate and solicitor towards his client, inter alia, to present every defence that the law permits and to uphold the interest of his client, justice and the dignity of the profession without regard to any unpleasantness to himself or to any other person. He is suppose to act fearlessly.

That is well and good but what happens when there is a conflict between his obligation to the court and his duty to his client? As an officer of the court his obligation to the court prevails over his duty to the client. Lee Hun Hoe CJ (Borneo) speaking for the Federal Court in the case of *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299 at p 301 said:

> It is very important for a counsel to remember that whatever may be his duty to his client his duty to the court remains paramount in the administration of justice.

There are a number of authorities affirming the role and duties of an advocate and solicitor vis-a-vis his client. Rule 36 of the Rules, however, requires him to terminate the relationship if the instruction of his client borders on contempt. Rule 36 states:

> An advocate and solicitor shall use his best efforts to prevent his client from doing things which the advocate and solicitor himself ought not to do, particularly with reference to his conduct towards Courts and judicial officers, jurors, witnesses and parties. Where a client persists in such wrong doing the advocate and solicitor shall terminate the relationship.

Merely saying in defence that an advocate and solicitor was acting on the instructions of his client without anything more is not, in my view, a defence to an offence of contempt. In this respect I refer to what Mahajan CJ in *MY Shareef & Anor v Hon'ble Judges of the Nagpur High Court* AIR 1955 SC 19 at p 23, said:

> It cannot be denied that a section of the Bar is under an erroneous impression that when a counsel is acting in the interest of his client, or in accordance with his instructions he is discharging his legitimate duty to his client even when he signs an application or a pleading which contains matter scandalizing the court. They think that when there is a conflict between their obligations to the court and their duty to the client, the latter prevails.
>
> This misconception has to be rooted out by a clear and emphatic pronouncement, and we think it should be widely made known that counsel who sign applications or pleadings containing matter scandalizing the court without reasonably satisfying themselves about the prima facie existence of adequate grounds therefore, with a view to prevent or delay the course of justice, are themselves guilty of contempt and that it is no duty of a counsel to his client to take any interest in such applications; on the other hand, his duty is to advise his client for refraining from making allegations of this nature in such applications.

However, if the appellant reasonably satisfied himself that there exist adequate grounds to file such an application then, in my view, that would afford him a good defence so long as he did not overstep the mark between his legal duty and contempt.

Before considering whether there are adequate grounds in filing such an application, I need to consider whether DSAI has the right to make such an application and if he has no such right then it would be the duty of the appellant to advise him accordingly. Whyatt CJ in *Yee Chang & Co Ltd v NV Koninklijke Paketvaart Maatschappij* [1958] MLJ 131 at p 133 said:

> It has been laid down by the House of Lords in *Myers v Elman* [1940] AC 282, that a solicitor owes a duty to the court to conduct litigation with due propriety and to assist in promoting in his own sphere the cause of justice. If, therefore, a solicitor becomes aware in the course of proceedings that his client is obstructing the interests of justice, it is his duty to advise his client as to the conduct which he ought to follow and if the client still persists in his wrong conduct, he should decline to act for him further.

If DSAI has adequate grounds to complain and to seek the justice of his case, to whom does he complain? In my view, the forum is none other than the court. I say so, as aptly stated by Lord Diplock in *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54 at p 72:

> The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law.

There is therefore, in my view, the right for DSAI as a citizen to have access to constitutionally constituted courts for determination of disputes as to his legal rights and liabilities. However, such right, in my view, is subject to

showing prima facie adequate grounds to do so as otherwise such application can be considered as baseless and an abuse of the process of the court which would attract contempt of court.

The learned Chief Judge has extensively considered the grounds relied on by DSAI in his application filed through the appellant's firm. I need not repeat them here. Suffice for me to state that I agree with the conclusion of the learned Chief Judge — *In my view, he was prima facie justified in filing the said application.*

In short, if the filing of the application was prima facie justified there could be no question of the appellant being liable for contempt of court for acting on the instructions of DSAI. In other words, the appellant could not be said to be reckless and negligent and acted in bad faith in filing the application as held by the learned High Court judge and upheld by the Court of Appeal.

Hence, the question of undermining the authority and/or integrity of the trial in progress did not arise. I would add that the issue of trying to derail the trial also did not arise as evidence showed that the appellant was merely asking for a short adjournment to prepare his defence, that is, just a few days. Surely justice should be accorded to him to do so as his liberty was at stake and such an application should not be viewed negatively by the court as if to prevent or delay the course of justice.

In the circumstances, I would allow the appeal and set aside the conviction and sentence.

Appeal allowed.

Reported by Zahid Taib